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Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] #9 1963

CHARLES F. BARR, RICHARD M. COUNTS, DAVID CARTER, MILTON D. GREENE AND JOHNNY CLARK, PETITIONERS,

versus

THE CITY OF COLUMBIA, RESPONDENT

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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STATEMENT

We adopt as our Statement the summary of the proceedings in the Recorder's Court as given by Mr. Justice Oxner for the Supreme Court of South Carolina:

"The five appellants, all Negroes, were convicted in the Municipal Court of The City of Columbia of trespass in violation of Section 16-386 of the 1952 Code, as amended, and of breach of the peace in violation of Section 15-909. Each Defendant was sentenced to pay a fine of $100.00 or serve a period of thirty days in jail on each charge but

$24.50 of the fine was suspended. From an order of the Richland County Court affirming their conviction, they have appealed.

"The exceptions can better be understood after a review of the testimony. The charges grew out of a 'sit-down' demonstration staged by appellants at the lunch counter of the Taylor Street Pharmacy in The City of Columbia, a privately owned business. In addition to selling articles usually sold in drugstores, this establishment maintains a lunch counter in the rear, separated from the front of the store by a partition. The customers sit on stools. The policy of this store is not to serve Negroes at the lunch counter although they are permitted to purchase food and eat it elsewhere. In a sign posted the privilege of refusing service to any customer was reserved.

"Shortly after noon on March 15, 1960, appellants, then college students, according to a prearranged plan, entered this drugstore, proceeded to the rear and sat down at the lunch counter. The management had heard of the proposed demonstration and had notified the officers. To prevent any violence, three were present when appellants entered. As soon as they took their seats several of the customers at the counter, including a White woman next to whom one of appellants sat, stood up. The manager of the store then came back to the lunch counter. He testified that the situation was quite tense, that you 'could have heard a pin drop in there', and that 'everyone was on pins and needles, more or less, for fear that it could possibly lead to violence.' He immediately told appellants that they would not be served and requested them to leave. They said nothing and continued to sit. At the suggestion of one of the officers, the manager then spoke to each of them and again requested that they leave. One of them stood up and inquired if he could ask a question. As this was done, the other four appellants arose. The manager replied that he did not care to

enter into a discussion and a third time told appellants to leave. Instead of doing so, they resumed their seats. After waiting several minutes, the officers arrested all of them and took them to jail.

"The foregoing summary is taken from the testimony offered by the State. Only two of the appellants testified. They denied that the manager of the store requested them to leave. They testified that an employee at the lunch counter stated to them, 'You might as well leave because I ain't going to serve you', which they did not construe as a specific request. They said after it became apparent that they were not going to be served, they voluntarily left the lunch counter and as they proceeded to do so, were arrested. They denied that any of the White customers got up when they sat down, stating that these customers did so only after the employee at the lunch counter said: 'Get up, we will get them out of here.'"

REASONS FOR DENYING THE WRIT

I

The Petitioners Were Trespassers and Were Subject to Being Ejected or Arrested Without Violating Their Rights Under the Fourteenth Amendment.

This case does not come within the rule of *Garner v. Louisiana*, 368 U. S. 157, 7 L. Ed. (2d) 207, 82 S. Ct. 248. Petitioners were "sit-ins" but they were not arrested for merely sitting or demonstrating. They were arrested only after the owner of the private lunch counter asked them to leave the premises and they failed or refused to do so. They were trespassers then, if not before, both under common and statutory law and were arrested and convicted as such.

The lunch counter was privately owned, was within a privately owned drugstore in a privately owned building on privately owned ground and was engaged purely in local

commerce. The rights and duties of the proprietor were like those of a restaurant not an inn. As stated in *Alpaugh v. Wolverton*, 36 S. E. (2d) 906, 184 Va. 943, "He [the proprietor] is under no common law duty to serve everyone who applies to him. In the absence of statute, he may accept some customers and reject others on purely personal grounds."

Such proprietor violates no constitutional provisions if he makes a choice on the basis of color. *Williams v. Howard Johnson's Restaurant*, 268 F. (2d) 845; *Slack v. Atlantic White Tower System, Inc.*, 284 F. Ed. 747 (1960).

If petitioners had no right to be served, the proprietor could as he did here, ask them to leave and upon their refusal to comply with his request, they became trespassers. This has always been the law in South Carolina.

In *State v. Lazarus*, 1 Mill, Const. (8 S. C. Law) 31, (1817), the South Carolina Constitutional Court said: • • • "the prosecutor having business to transact with him [the defendant], had a right to enter his house and if he remained after having been ordered to depart, might have been put out of the house, the defendant using no more violence than was necessary to accomplish this object, and showing to the satisfaction of the court and judge, that this was his object."

In *Shramek v. Walker*, 152 S. C. 88, 149 S. E. 331 (1929), the Supreme Court of South Carolina quoted the rule as stated above in the *Lazarus case*, then quoted further with approval from 2 R. C. L., 559, as follows:

> "Therefore, while the entry by one person on the premises of another may be lawful, by reason of express or implied invitation to enter, his failure to depart, on the request of the owner, will make him a trespasser and justify the owner in using reasonable force to eject him."

Neither of the above cases involved questions of race.

In addition to becoming trespassers at common law, petitioners also violated Section 16-386 of the Code of Laws of South Carolina, 1952, as amended. The section was apparently first enacted in 1866. In the General Statutes of South Carolina (1882), it read as follows:

> "Sec. 2507. Every entry on the enclosed or unenclosed land of another, after notice from the owner or tenant prohibiting the same shall be a misdemeanor."

An Amendment of 1883 left out the words "the enclosed or unenclosed" and added punishment by fine of not more than $100.00 or imprisonment of not more than 30 days, **1883 Acts, etc. of South Carolina (18)**, page 43.

An Amendment of 1898 made the posting and publishing of notice conclusive as to those making entry for hunting and fishing. **1898 Acts, etc. of South Carolina (22)**, page 811.

The Amendment of 1954 was tied in with an Amendment to Section 16-355 increasing the penalty for larceny of livestock and as such added the words "where any horse, mule, cow, hog or any livestock is pastured, or any other lands of another", eliminated the requirement for publishing the notice and changed the conclusiveness of notice from the purpose of hunting and fishing to that of trespassing. **1954 Acts, etc. of South Carolina (48)**, page 1705.

The section thus read at the time petitioners were arrested in 1960, as follows:

> "Sec. 16-386. Entry on lands of another after notice prohibiting same. Every entry upon the lands of another where any horse, mule, cow, hog, or any other livestock is pastured, or any other lands of another, after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed one hundred dollars, or by imprisonment with hard labor on the public works of the county

> for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry as aforesaid for the purpose of trespassing."

The pertinent language, however, has remained the same for many years: "Every entry upon lands of another * * * after notice from the owner or tenant prohibiting such entry, shall be a misdemeanor. * * *"

The South Carolina Supreme Court made no strained nor novel interpretation in applying the section to petitioners. In Webster's New International Dictionary (Second Edition) "land" as used in "law" is defined as follows:

> "a. Any ground, soil, or earth whatsoever, regarded as the subject of ownership, as meadows, pastures, woods, etc. and everything annexed to it, whether by nature, as trees, water, etc., or by man as buildings, fences, etc., extending indefinitely vertically upwards and downwards.
>
> "b. An interest or estate in land, loosely, any tenement or hereditament."

And the South Carolina Supreme Court simply followed the common law rule as stated in the *Lazarus* and *Walker cases, supra,* in applying the rule that a person may become a trespasser by refusing to leave even though his entry may have been lawful. *City v. Mitchell,* filed Dec. 13 1961, ... S. C. ...., 123 S. E. (2d) 512.

II

The Decision of the Supreme Court of South Carolina Granted Petitioners All Rights to Freedom of Expression to Which They Were Entitled Under the Fourteenth Amendment to the Constitution of the United States.

There is no question but if a White man or a group of White men had gone into Taylor Street Pharmacy on the

day in question, had sat down, expecting service, had been told that they would not be served, and were further asked to leave but refused to do so, that they would have been guilty of violating Sec. 16-386 of the Code of Laws of South Carolina, 1952, as amended.

If Petitioners' argument is understood, however, Petitioners urge that because they were Negroes and the owners of the lunch counter White, their right to protest exceeded their right to be served.

Is the right to protest greater than the right to concur? The Fourteenth Amendment states simply and clearly that no State shall "deny to any person within its jurisdiction the **equal** protection of the laws."

The "freedoms" guaranteed by the Constitution do not give a person a license to stand in a prohibited place to protest where he could not have stood to concur. Rather, the Constitution guarantees that a person standing where he has a right to stand, shall not be **moved** from that place by the State because of his protest, if his protest is within the protection of the Constitution.

As a practical matter, however, Petitioners were permitted to give full range to their protest. As they state on pages 19 and 20 of their Petition for Writ of Certiorari:

> "Petitioners were engaged in the exercise of free expression by means of nonverbal requests for nondiscriminatory lunch counter service which were implicit in their continued remaining at the lunch counter when refused service. The fact that sit-in demonstrations are a form of protest and expression was observed in Mr. Justice Harlan's concurrence in *Garner v. Louisiana, supra.* Petitioners' expression (asking for service) was entirely appropriate to the time and place at which it occurred. Petitioners did not shout, obstruct the conduct of business, or engage in any expression which had that effect. There were no speeches, picket signs, handbills or other forms of expression in the store

> which were possibly inappropriate to the time and place. Rather petitioners merely expressed themselves by offering to make purchases in a place and at a time set aside for such transactions."

The owner told them that they would not be served and asked them to leave. It was only after they refused to comply with this request that they were arrested.

What more did petitioners want to do to express their protest? Continue to sit? For how long? Who decides when they shall leave?

This was not a street, private or otherwise, as was involved in *Marsh v. Alabama*, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265, where a person enters and stands as a matter of right but a private lunch counter in local commerce where a person enters and stands (or sits) upon invitation, express or implied, of the owner. The law decides how long a person has the right to remain on a street but the owner decides who shall remain in his store, and how long.

III

The Question of the Conviction of Petitioners for Breach of the Peace in Violation of Sect. 15-909 of the Code of Laws of South Carolina, 1952, in Addition to the Conviction for Trespass Under Section 16-386 of Said Code, Has Never Been Properly Raised.

As stated by the Supreme Court of South Carolina in this case, in the last paragraph of its opinion:

> "In oral argument counsel for appellants raised the question of merger of the two offenses and argued that there could not be a conviction on both charges. But this question is not raised by any of the exceptions, is not referred to in the brief of appellants and, therefore, is not properly before us."

CONCLUSION

In conclusion, it is respectfully submitted that the Supreme Court of South Carolina decided all federal questions of substance in the case in accordance with applicable decisions of this Court and the Petition for Writ of Certiorari should be denied.

All of which is respectfully submitted.

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May 3, 1962.